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IN THE

Supreme Court of the United States

JANUARY TERM, 1947

No. 837

BERNARD LICHT, HERMAN J. LICHT and HARRY LICHT,
Petitioners and Appellants Below,

against

UNITED STATES OF AMERICA,
Respondent and Appellee Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Supreme Court of the United States:

The petition of Bernard Licht, Herman J. Licht and Harry Licht respectfully shows:

I

Summary statement of the matter involved

Petitioners were convicted by a jury after a trial in the United States District Court for the Southern District of New York (R. 1) upon an indictment (R. 6) charging

them, under two separate counts, with the crimes of CONSPIRACY (Title 18, Sec. 88, U. S. Code) to violate subd. (1), Sec. 52b, Title 11, U. S. Code, and of WILFULLY CONCEALING ASSETS OF A BANKRUPT FROM A TRUSTEE IN BANKRUPTCY (Title 11, Sec. 52, subd. (1), U. S. Code).

Each petitioner was sentenced to imprisonment for one year and one day on both counts, the sentences to run concurrently. In addition, Bernard Licht and Herman J. Licht were fined $1,000 and Harry Licht $5,000 to cover both counts (R. 4-5).

Petitioners appealed to the United States Circuit Court of Appeals for the Second Circuit upon the ground, among others, that the prosecutor's unwarranted insinuation that petitioners Herman J. Licht and Bernard Licht had falsified their statements to the draft board, and the prosecutor's injection of the war as an issue, prejudiced petitioners' substantial rights, and deprived them of a fair trial.

The Circuit Court, in an opinion by JUDGE SWAN concurred in by JUDGE CLARK, affirmed the conviction (R.), JUDGE FRANK *dissenting* on the ground that in so close a case as the one at Bar, the aforementioned errors were prejudicial and required the granting of a new trial (R.).

The questions presented are:

(1) Whether it is prejudicial error in a criminal case admittedly deemed close by the trial judge and based solely on circumstantial evidence (R. 749) for the prosecutor to make unwarranted insinuation that the defendants Herman J. Licht and Bernard Licht had falsified their draft status, and to inject the war as an issue to inflame the passions and prejudices of the jury; and

(2) Whether it is prejudicial error for the Trial Court to fail adequately to cure such error by proper instruction to the jury and admonition to the prosecutor.

The defendants were tried while World War II was in progress. At five separate times in his summation the prosecutor irrelevantly referred to the war in the following terms:

(1) "I am talking about lies, prewar and postwar varieties, and with the Lichts, there is no change because of the war; * * *" (R. 675).

(2) The prosecutor referred to the two younger defendants as "the young boys, who in 1941 were 28 and 26 respectively" (R. 699). This was an obvious reference to the fact that they were of draft age.

(3) Referring to Bernard Licht, he said, "Although it has nothing to do with this case, I think he lied in putting in answers on his questionnaire * * *" (R. 699-700). This was objected to by the defense counsel, and was followed by a mild reminder by the trial judge to disregard the argument (R. 700).

(4) "A lot has gone on since December, 1941. It is unfortunate to see a father and two sons on trial. I do not think you will waste any crocodile tears over the fact that in this particular case we have a father and two sons on trial. A lot more tragic and horrible things have happened * * *" (R. 703). This was objected to by defense counsel, but the court did not rule on the objection, merely telling the prosecutor to "go ahead and sum up".

(5) The prosecution stated that its entire case rested on the fact that the burglary of defendants' store was a "phony burglary" (R. 674). Then referring to the possibility of the "real burglars" showing up, the prosecutor said "There is about as much chance of them showing up as the Japanese have of winning the war * * *" (R. 696).

The prosecutor throughout his argument sought to show by innuendo and subtle remarks that the defendants, at least the two younger ones, were draft dodgers, and that the war had meant no change for them while it

affected countless others. The purpose of these statements was to inflame the passions and prejudices of the jury against the defendants and introduce irrelevant issues.

The Trial Court, in granting bail pending appeal, stated:

> "It was a purely circumstantial case. I rather thought the jury would acquit. I think I expressed my idea at the time that it was not the strongest case in the world and I wouldn't have been surprised had the jury acquitted" (R. 749).

Under these circumstances, prejudicial remarks by a prosecutor during his summation tending to incite the passions and prejudices of the jury against the defendants, cannot be considered mere harmless error, but highly prejudicial error substantially swaying the judgment of the jury.

Moreover, it was mandatory for the Trial Court to act of its own volition to prevent the continuous course of misconduct by the prosecutor, and to stress the irrelevancy of such statements in strong language to the jury.

The prosecutor's improper conduct and the Trial Court's failure to correct that error prevented petitioners from receiving a fair trial on the issues.

II

Reasons relied on for allowance of the writ

1

The decision of the Circuit Court of Appeals for the Second Circuit is in direct conflict with the applicable law established by this Court and by the various Circuit Courts which hold that irrelevant appeals to the passions

and prejudices of a war-time jury constitute prejudicial error in a case involving close questions of fact.

2

The decision of the Circuit Court of Appeals for the Second Circuit deeming non-prejudicial the failure of the trial judge to emphatically instruct the prosecutor to refrain from making irrelevant appeals based on the war in a war-time trial involving close questions of fact, and his failure to emphatically instruct the jury to disregard these statements of the prosecutor, sanctions so far a departure by the Trial Court from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

3

The decision of the Circuit Court of Appeals for the Second Circuit deeming non-prejudicial the prosecutor's unwarranted innuendo that the defendants Herman J. Licht and Bernard Licht had falsified their statement to the draft board and the prosecutor's improper appeal to the jury based on the war, in a trial involving close questions of fact, departs so far from the accepted and usual course of judicial proceedings, and sanctions so far a departure by the Trial Court and the prosecutor from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

WHEREFORE, your petitioners pray that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Second Circuit, directing said court to certify and send to this Court a full and complete transcript of the record and proceedings of the said Circuit Court had in the case numbered and entitled

on its docket, Calendar No. 20336, "United States of America, Appellee v. Bernard Licht, Herman J. Licht and Harry Licht, Defendants-Appellants", to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals be reversed by this Court; and for such further relief as to this Court may seem proper.

Dated, New York, December 28, 1946.

BERNARD LICHT,
HERMAN LICHT and
HARRY LICHT,

By JAMES D. C. MURRAY,
Counsel for Petitioners.

ABRAHAM J. GELLINOFF,
ARNOLD H. FASSLER,
Of Counsel.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinion of the Courts Below

There was no opinion rendered by the Trial Court. The opinion of the Circuit Court below and the dissenting opinion, rendered on December 3, 1946, is still unreported, but is contained at the end of the record (R.).

II

Jurisdiction

1. The decision of the Circuit Court below was entered on December 3, 1946, but the issuance of its mandate on

appeal has been suspended by stipulation, dated December 10, 1946, entered into between counsel for the appellee and the appellants, until the determination of the instant application by this Court.

2. The statutory provisions believed to sustain the jurisdiction of this Court are Title 28, Section 347, U. S. Code, subdivision a (*Judicial Code, Section 240a, as amended*) and Rule 38 of the Revised Rules (1939) of this Court.

3. The reasons stated in the preceding petition under II (pp. 4, 5, *supra*) are herewith adopted and made part of this brief, and are believed to constitute good grounds for invoking the jurisdiction of this Court.

III

Statement of the Case

This has already been stated in the preceding petition under I (pp. 1-4, *supra*) which is hereby adopted and made a part of this brief.

IV

Specification of Errors

The Circuit Court erred in holding that it was not prejudicial error (1) for the prosecutor to make irrelevant and prejudicial statements concerning the war and the draft status of the appellants in a case admittedly deemed close by the Trial Court; and (2) for the Trial Court to fail to correct and stop such error by proper instruction to the jury and admonition to the prosecutor.

ARGUMENT

A

To determine whether an error substantially affects the rights of an accused to his prejudice or is harmless, the crucial test is the impact of the thing done wrong on the minds of the jury considered in the total setting. The inquiry cannot be merely whether there was enough to support the result apart from the error. It is rather whether the error itself had substantial influence. If so, or if one is left in grave doubt, a conviction cannot stand.

Kotteakos v. *United States*, — U. S. —, 66 Sup. Ct. 1239;
Bollenbach v. *United States*, 326 U. S. 607, 614.

B

The Circuit Court erred in holding that the prosecutor's references to the war and his unwarranted innuendoes that the defendants were draft dodgers did not constitute prejudicial error. At a time when passions and prejudices are heightened by participation in a war, remarks of a prosecutor reflecting upon the defendants' participation in the war effort are highly prejudicial and offensive to the dignity and good order with which court proceedings should be conducted. It is the duty of the Trial Court to stop the prosecutor's discourse without waiting for an objection.

Where the misconduct of the prosecutor is not confined to a single instance, but persistent, the cumulative effect upon the jury is consequential and destroys a calm consideration of the rights of the defendant. The virus thus implanted in the minds of the jury is not easily extracted, and in a close case, nothing short of immediate and

emphatic censure of the prosecutor by the Trial Court can remove the prejudicial error. The Trial Court in the instant case, although deeming it a close case, failed to so act, and prejudicial error was committed against the defendants, depriving them of a fair trial.

Viereck v. *United States*, 318 U. S. 236, 247-8;
Berger v. *United States*, 295 U. S. 78, 85, 88-9;
August v. *United States*, 257 Fed. 388, 393 (C. C. A. 8th Circ.);
Elmer v. *United States*, 260 Fed. 646 (C. C. A. 8th Circ.);
Hall v. *United States*, 256 Fed. 748 (C. C. A. 4th Circ.);
People v. *Levan*, 295 N. Y. 26, 36;
People v. *Esposito*, 224 N. Y. 370, 374;
E. A. Strout Farm Agency, Inc. v. *De Forest*, 201 App. Div. 777, 195 N. Y. S. 101;
Grigsby v. *Commonwealth*, 299 Ky. 721;
Eiland v. *State*, 95 Tex. Crim. Rep. 525.

CONCLUSION

It is respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers by granting a writ of certiorari and thereafter reviewing and reversing said decision of the Circuit Court of Appeals for the Second Circuit.

Respectfully submitted,

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